



December 9, 2015

**Via USDA Freedom of Information Act Public Access Website**

Alexis Graves; USDA Departmental FOIA Officer  
1400 Independence Ave., SW  
Room 428-W, Whitten Building  
Washington, DC 20250-0706

**Re: FOIA request for labels for agricultural seeds treated with  
neonicotinoids**

Dear Ms. Graves or Whom It May Concern:

I write on behalf of the Natural Resources Defense Council (NRDC) to request disclosure of records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and applicable U.S. Department of Agriculture (USDA) regulations, 7 C.F.R. § 1.1-1.25. This letter describes the records sought and includes a request for a public interest fee waiver.

**I. Description of Records Sought**

Please produce all labels for agricultural seeds available for purchase within the United States that are treated with the following neonicotinoids:

- 1) Acetamiprid
- 2) Clothianidin
- 3) Dinotefuran
- 4) Imidacloprid
- 5) Thiacloprid
- 6) Thiamethoxam

Please produce responsive documents in electronic form where possible.

**II. Request for a Fee Waiver**

NRDC requests that USDA waive any fee it would otherwise charge for search and production of the records described above. FOIA requires that requested records be provided without charge "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the

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operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 7 C.F.R. pt. 1, subpt. A, app. A § 6(a). The requested disclosure would meet both of these requirements. In addition, NRDC qualifies as “a representative of the news media” entitled to a reduction of fees under FOIA. 5 U.S.C. § 552(a)(4)(A)(ii)(II); *see also* 7 C.F.R. pt. 1, subpt. A, app. A § 5(c).

## **A. NRDC Satisfies the First Fee Waiver Requirement**

The disclosure requested here would be “likely to contribute significantly to public understanding of the operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 7 C.F.R. pt. 1, subpt. A, app. A § 6(a). The USDA articulates six factors that determine whether fees will be waived, the first four of which speak to this first fee waiver requirement. An analysis of these four factors indicates that a fee waiver is appropriate for this request. *See* 7 C.F.R. pt. 1, subpt. A, app. A § 6(a)(1)(i)-(iv).

### **1. Subject of the request**

The records requested here are agricultural seed labels regulated by 7 U.S.C. § 1581(4) and 7 C.F.R. § 201.31a. The first of these provisions prohibits the importation of agricultural or vegetable seeds that have been treated with substances harmful to humans or other vertebrate animals, unless the seeds have labels: indicating that they have been treated; listing the name of the substance used in their treatment; providing an approved caution statement, where applicable; and providing a description of the treatment process. *See* 7 U.S.C. § 1581(4). The required caution statements and descriptions must be “approved by the Secretary of Agriculture as adequate for the protection of the public.” *Id.* Similarly, through 7 C.F.R. § 201.31a, the USDA regulates the contents of labels for agricultural and vegetable seeds that have been treated with substances harmful to humans or other vertebrate animals. The requested records therefore directly speak to USDA’s regulation of treated seeds through labeling requirements, as well as the extent to which the agency has been enforcing industry compliance with those labeling requirements, particularly with respect to seeds treated with neonicotinoids. Thus, the requested records concern “the operations or activities of the government.” 7 C.F.R. pt. 1, subpt. A, app. A § 6(a)(1)(i).

### **2. Informative value of the information to be disclosed**

The requested records are “likely to contribute” to the public’s “understanding of government operations or activities.” 7 C.F.R. pt. 1, subpt. A, app. A § 6(a)(1)(ii). The public does not currently possess comprehensive information regarding the extent to which seeds treated with neonicotinoids bear the requisite label language

required by 7 U.S.C. § 1581(4) and 7 C.F.R. § 201.31a. Information regarding these labels is not provided on USDA's website, nor is it accessible via internet searches. In contrast, the EPA has a publicly accessible online database of pesticide labels to ensure that vital information that impacts human health and the environment is shared with the public.<sup>1</sup> Given the absence of any publicly available repository of seed labels, it would be impossible for any individual to acquire comprehensive information about the USDA's oversight of seed labeling and enforcement of seed labeling regulations.

Disclosure of the requested records would thus meaningfully inform public understanding of USDA's regulation, through labeling requirements, of seeds treated with a class of insecticides that pose environmental and human health risks. Disclosure would also shed light on the extent to which USDA has been enforcing industry compliance with the label language required by statute and agency regulation.

**3. Contribution to an understanding of the subject by the general public is likely to result from disclosure**

NRDC's expertise in environmental pollutants and their health impacts, extensive communications capabilities, and proven history of dissemination of information of public interest—including information obtained from FOIA records requests—indicate that NRDC has the ability and will to use disclosed records to reach a broad audience of interested persons with any relevant and newsworthy information the records reveal. There is therefore a strong likelihood that disclosure of the requested records will increase "public understanding" of the subject matter. 7 C.F.R. pt. 1, subpt. A, app. A § 6(a)(1)(iii). *See also Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (holding that a requester who specified multiple channels of dissemination and estimated viewership numbers demonstrated a likelihood of contributing to public understanding of government operations and activities).

NRDC intends to disseminate any newsworthy information in the released records and its analysis of such records to its member base and to the broader public, through one or more of the many communications channels referenced below. NRDC has frequently disseminated newsworthy information to the public for free, and does not intend to resell the information requested here. NRDC's more than one million members and online activists are a broad audience of persons interested in the subject of health impacts of environmental pollutants, and when combined with NRDC's communications to the public at large, the likely audience of interested

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<sup>1</sup> *See* EPA, *Pesticide Product Label System*, <http://iaspub.epa.gov/apex/pesticides/f?p=PPLS:1> (last visited Nov. 25, 2015).

persons to be reached will be significant enough to ensure a “contribut[ion] to ‘public understanding.’” 7 C.F.R. pt. 1, subpt. A, app. A § 6(a)(1)(iii). As NRDC’s long history of incorporating information obtained through FOIA into reports, articles, and other communications illustrates, NRDC is well prepared to convey to the public any relevant information it obtains through this records request.

NRDC has the ability to disseminate information collected from this FOIA request through many channels. As of December 2014, these include, but are not limited to the following:

- \* NRDC’s website, available at <http://www.nrdc.org> (homepage at Att. 1), is updated daily and draws approximately 1,200,000 page views and 690,000 unique visitors per month.

- \* OnEarth magazine (sample issue at Att. 2) is published as a bimonthly digital magazine, and is available free of charge at <http://www.onearth.org>. The site is updated regularly and also includes Earthwire, a daily newsfeed (Att. 3). It receives more than 82,000 unique visitors per month.

- \* Nature’s Voice newsletter on current environmental issues (sample issue at Att. 4) is distributed four times a year to NRDC’s more than one million members and online activists, and is available online at <http://www.nrdc.org/naturesvoice/default.asp> (Att. 5).

- \* Activist Network email list (sample email at Att. 6) includes more than 735,000 members who receive biweekly information on urgent environmental issues. This information is also made available through NRDC’s online Action Center at <http://www.nrdc.org/action/default.asp> (Att. 7).

- \* NRDC This Week is a monthly electronic environmental newsletter distributed by email to more than 63,000 subscribers, at <http://www.nrdc.org/newsletter> (Att. 8).

- \* “Switchboard,” available at <http://switchboard.nrdc.org> (Att. 9) is a staff blogging site that is updated daily and features more than 250 bloggers writing about current environmental issues. The blogs draw approximately 154,000 page views and 127,000 unique visitors per month; Switchboard’s RSS feeds have approximately 11,150 subscribers; and Switchboard posts appear on websites of other major internet media outlets, such as “The Huffington Post,” at <http://www.huffingtonpost.com> (sample post at Att. 10).

- \* NRDC’s profiles on “Facebook,” at <http://www.facebook.com/nrdc.org> (Att. 11), and “Twitter,” at <http://www.twitter.com/nrdc> (Att. 12), are updated daily and have approximately 278,000 fans and 151,000 followers, respectively.

\*NRDC issues press releases, issue papers, and reports; directs and produces movies, such as *Stories from the Gulf*, narrated by Robert Redford, and *Acid Test*, narrated by Sigourney Weaver; participates in press conferences and interviews with reporters and editorial writers; and has approximately forty staff members dedicated to communications work.

\*NRDC employees provide Congressional testimony; appear on television, radio, and web broadcasts and at conferences; and contribute to numerous national newspapers, magazines, academic journals, other periodicals, and books. A few examples are provided below:

- Research article, “The requirement to rebuild US fish stocks: Is it working?” *Marine Policy*, July 2014 (co-authored by NRDC Oceans Program Senior Scientist Lisa Suatoni and Senior Attorney Brad Sewell) (Att. 13);
- Issue brief, “The Untapped Potential of California’s Water Supply: Efficiency, Reuse, and Stormwater,” June 2014 (co-authored by NRDC Water Program Senior Attorney Kate Poole and Senior Policy Analyst Ed Osann) (Att. 14); *see also* “Saving Water in California,” *N.Y. Times*, July 9, 2014 (discussing the report’s estimates) (Att. 15);
- Article, “Waves of phony charges over new clean water safeguards,” *The Hill*, June 17, 2014 (by NRDC Executive Director Peter Lehner) (Att. 16);
- Article, “Don’t Buy the Smear of the EPA,” *L.A. Times*, June 3, 2014 (by NRDC President Frances Beinecke) (Att. 17);
- Transcript, “Conservationists Call For Quiet: The Ocean Is Too Loud!” *Nat’l Pub. Radio, All Things Considered*, July 28, 2013 (featuring NRDC Marine Mammal Protection Program Director Michael Jasny) (Att. 18);
- Testimony of David Doniger, NRDC Climate and Air Program Policy Director and Senior Attorney, before the United States House Subcommittee on Energy and Power, June 19, 2012 (Att. 19);
- Article, “Pollution Still a Hazard to U.S. Beaches,” *CBS, CBS NEWS*, July 29, 2009 (featuring former NRDC Water Program Co-Director Nancy Stoner) (Att. 20);
- Conference brochure, “World Business Summit on Climate Change,” May 24-26, 2009 (featuring former NRDC Director for Market Innovation Rick Duke at 9) (Att. 21);

- Article, “Is there a ‘proper level’ of compliance with environmental law?” Trends: ABA Section of Environment, Energy, and Resources Newsletter, Jan./Feb. 2008 (authored by NRDC Senior Attorney Michael Wall) (Att. 22);
- NRDC Document Bank, <http://docs.nrdc.org/> (Att. 23).

NRDC routinely uses FOIA to obtain information from federal agencies that NRDC legal and scientific experts analyze in order to inform the public about a variety of issues, including energy policy, climate change, wildlife protection, nuclear weapons, pesticides, drinking water safety, and air quality. Some specific examples are provided below:

(1) In April 2014, NRDC relied on FOIA documents for a report on potentially unsafe chemicals added to food, without the safety oversight of the Food and Drug Administration or the notification to the public. The report, titled Generally Recognized as Secret: Chemicals Added to Food in the United States, reveals concerns within the agency about several chemicals used as ingredients in food that manufacturers claim are “generally recognized as safe” (Att. 24). *See also* Kimberly Kindy, “Are secret, dangerous ingredients in your food?” Wash. Post, Apr. 7, 2014 (discussing NRDC’s report) (Att. 25).

(2) NRDC obtained, through FOIA, FDA review documents on the nontherapeutic use of antibiotic additives in livestock and poultry feed. In January 2014, NRDC published a report, titled Playing Chicken with Antibiotics, which is based on the documents obtained, and reveals decades of hesitancy on FDA’s part to ensure the safety of these drug additives (Att. 26). *See also* P.J. Huffstutter and Brian Grow, “Drug critic slams FDA over antibiotic oversight in meat production,” Reuters, Jan. 27, 2014 (discussing NRDC’s report) (Att. 27).

(3) NRDC has used White House documents obtained through FOIA and from other sources to inform the public about EPA’s decision not to protect wildlife and workers from the pesticide atrazine in the face of industry pressure to keep atrazine on the market. *See* Still Poisoning the Well: Atrazine Continues to Contaminate Surface Water and Drinking Water in the United States, <http://www.nrdc.org/health/atrazine/files/atrazine10.pdf> (Apr. 2010) (update to 2009 report) (Att. 28); *see also* William Souder, “It’s Not Easy Being Green: Are Weed-Killers Turning Frogs Into Hermaphrodites?” Harper’s Bazaar, Aug. 1, 2006 (referencing documents obtained and posted online by NRDC) (Att. 29).

(4) NRDC incorporated information obtained through FOIA into a report, available at <http://www.nrdc.org/wildlife/marine/sound/contents.asp>, on the impacts of military sonar and other industrial noise pollution on marine life. *See* Sounding the

Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life (Nov. 2005) (update to 1999 report) (Att. 30). The report also relied upon and synthesized information from other sources. Since the report's publication, the sonar issue has continued to attract widespread public attention. *See, e.g.*, "Protest Raised over New Tests of Naval Sonar," Nat'l Pub. Radio, All Things Considered, July 24, 2007 (transcript at Att. 31).

(5) NRDC scientists have used information obtained through FOIA to publish analyses of the United States' and other nations' nuclear weapons programs. In 2004, for example, NRDC scientists incorporated information obtained through FOIA into a feature article on the United States' plans to deploy a ballistic missile system and the implications for global security. *See* Hans M. Kristensen, Matthew G. McKinzie, and Robert S. Norris, "The Protection Paradox," *Bulletin of Atomic Scientists*, Mar./Apr. 2004 (Att. 32).

(6) NRDC obtained through FOIA, and made public, records of the operations of the Bush administration's Energy Task Force, along with analysis of selected excerpts and links to the administration's index of withheld documents (Att. 33). NRDC's efforts cast light on an issue of considerable public interest. *See, e.g.*, Elizabeth Shogren, "Bush Gets One-Two Punch on Energy," *L.A. Times*, Mar. 28, 2002, at A22 (Att. 34).

(7) Through FOIA, NRDC obtained a memorandum by ExxonMobil, advocating the replacement of the sitting head of the Intergovernmental Panel on Climate Change, and used the document to help inform the public about what may have been behind the Bush administration's decision to replace Dr. Robert Watson. *See* NRDC Press Release and attached Exxon memorandum, "Confidential Papers Show Exxon Hand in White House Move to Oust Top Scientist from International Global Warming Panel," Apr. 3, 2002 (Att. 35); Elizabeth Shogren, "Charges Fly Over Science Panel Pick," *L.A. Times*, Apr. 4, 2002, at A19 (Att. 36).

(8) Through FOIA and other sources, NRDC obtained information on nationwide levels of arsenic in drinking water and used it in a report, *Arsenic and Old Laws* (2000), available in print and online at <http://www.nrdc.org/water/drinking/arsenic/aolinx.asp> (Att. 37). The report guided interested members of the public on how to learn more about arsenic in their own drinking water supplies. *Id.*; *see also* Steve LaRue, "EPA Aims to Cut Levels of Arsenic in Well Water," *San Diego Union-Tribune*, June 5, 2000, at B1 (referencing NRDC report) (Att. 38).<sup>2</sup>

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<sup>2</sup> There are numerous other examples of national news articles that were based in part on documents NRDC obtained through FOIA. *See, e.g.*, Felicity Barringer, "Science Panel Issues Report on Exposure to Pollutant," *N.Y. Times*, Jan. 11, 2005

As these examples demonstrate, NRDC has a proven ability to digest, synthesize, and quickly disseminate information gleaned from FOIA requests to a broad audience of interested persons. Therefore, the requested records disclosure is likely to contribute to the public's understanding of the subject.

#### 4. Significance of the contribution to public understanding

The records requested shed light on a matter of considerable public interest and concern: the proper labeling of seed products treated with neonicotinoid pesticides, which pose substantial concerns in terms of their environmental persistence, harmful impacts on wildlife, and damaging human health effects.<sup>3</sup>

The threats that neonicotinoid pesticides pose to human health are well documented. For instance, draft GreenScreen<sup>4</sup> assessments of imidacloprid, thiamethoxam, and clothianidin assign a GreenScreen Benchmark Score of 1 to

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(Att. 39); Katharine Q. Seelye, "Draft of Air Rule is Said to Exempt Many Old Plants," N.Y. Times, Aug. 22, 2003 (Att. 40); Don Van Natta, Jr., "E-Mail Suggests Energy Official Encouraged Lobbyist on Policy," N.Y. Times, Apr. 27, 2002 (Att. 41).

<sup>3</sup> See, e.g., Int'l Union for Conservation of Nature, *Systemic pesticides pose global threat to*

*biodiversity and ecosystem services* (June 24, 2014),

<http://www.iucn.org/?uNewsID=16025> (Ex. A);

The Task Force on Systemic Pesticides, *Worldwide Integrated Assessment of the Impacts of Systemic Pesticide on Biodiversity and Ecosystems* (Jan. 9, 2015),

available at [http://www.tfsp.info/assets/WIA\\_2015.pdf](http://www.tfsp.info/assets/WIA_2015.pdf) (Ex. B); Matt McGrath, *Widespread Impacts of Neonicotinoids 'Impossible to Deny'*, BBC News (June 23, 2014). <http://www.bbc.com/news/science-environment-27980344> (Ex. C).

<sup>4</sup> See GreenScreen for Safer Chemicals, *Full GreenScreen Method*,

<http://www.greenscreenchemicals.org/method/full-greenscreen-method> (last visited Nov. 25, 2015) ("GreenScreen® for Safer Chemicals is a method for comparative Chemical Hazard Assessment (CHA) that can be used for identifying chemicals of high concern and safer alternatives. It is used by industry, government and NGOs to support product design and development, materials procurement, and as part of alternatives assessment to meet regulatory requirements. It is used by businesses like Hewlett-Packard, governments like Washington State, and NGOs such as the Healthy Building Network in their Pharos Project. GreenScreen can also be used to support environmentally preferable product procurement tools including standards, scorecards and ecolabels.") (Ex. D).

each of these chemicals, which denotes that these are “chemicals of high concern.” Indeed, this is the Benchmark rating of highest concern under the GreenScreen system. The GreenScreen analysis accounts for, among other human health effects, the chemical’s carcinogenicity, mutagenicity, reproductive toxicity, developmental toxicity, and endocrine activity. *See also*:

- S.E. Koshlukova, et. al., Risk to Humans from Dietary Exposure to the Neonicotinoid Insecticide Imidacloprid (2008), [http://www.cdpr.ca.gov/docs/hha/pubs/imidacloprid\\_2008.pdf](http://www.cdpr.ca.gov/docs/hha/pubs/imidacloprid_2008.pdf) (Ex. E)
- Danny Hakim, European Agency Warns of Risk to Humans in Pesticides Tied to Bee Deaths, N.Y. Times (Dec. 17, 2013), [http://www.nytimes.com/2013/12/18/business/international/europe-warns-of-human-risk-from-insecticides.html?\\_r=0](http://www.nytimes.com/2013/12/18/business/international/europe-warns-of-human-risk-from-insecticides.html?_r=0) (Ex. F)
- European Food Safety Authority (EFSA), EFSA Assesses Potential Link Between Two Neonicotinoids and Developmental Neurotoxicity (Dec. 17, 2013), <http://www.efsa.europa.eu/en/press/news/131217> (Ex. G)
- Jennifer Sass, Neonicotinoid Pesticides - Bad for Bees, and May Be Bad for People Too (Set. 17, 2014), [http://switchboard.nrdc.org/blogs/jsass/neonicotinoid\\_pesticides\\_-\\_bad.html](http://switchboard.nrdc.org/blogs/jsass/neonicotinoid_pesticides_-_bad.html) (Ex. H)
- Dr. Marg Sanborn, Environmental Health Committee, Ontario College of Family Physicians, Neonicotinoid Pesticides and Human Health (June 2015), <http://ocfp.on.ca/tools/environmental-health-update/neonicotinoid-pesticides-and-human-health> (Ex. I)

Neonicotinoids are also dangerous to various forms of wildlife, including vertebrates and beneficial non-target pollinators.<sup>5</sup> For instance, a review of 150 studies of the impact of neonicotinoids on mammals, birds, fish, amphibians, and reptiles found

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<sup>5</sup> *See* WORLDWIDE INTEGRATED ASSESSMENT OF THE IMPACTS OF SYSTEMIC PESTICIDE ON BIODIVERSITY AND ECOSYSTEMS, *supra* note 3; Natural Resources Defense Council, *Bee Deaths, Pesticides, and a Stalled Regulatory System*, <http://www.nrdc.org/wildlife/animals/files/bee-deaths-FS.pdf> (last visited Dec. 3, 2015) (Ex. J); Tjeerd Blacquière et al., *Neonicotinoids in Bees: A Review on Concentrations, Side-Effects and Risk Assessment*, 21 *Ecotoxicology* 973, 973–92 (2012), available at <http://link.springer.com/article/10.1007/s10646-012-0863-x> (Ex. K).

them capable of both direct and indirect effects on these vertebrates.<sup>6</sup> The GreenScreen reports mentioned above also report findings on the vertebrate toxicity of imidacloprid, thiamethoxam, and clothianidin. The GreenScreen studies evaluate separately these neonicotinoids' toxicity to aquatic organisms, terrestrial vertebrates, and toxicity to foliar invertebrates and pollinators.

Given the harmful effects that neonicotinoids have on human health and wildlife, the public has a significant interest in learning how products treated with these chemicals are regulated. Thus, disclosure of the labels of all seeds treated with neonicotinoids facilitates an effort to enhance the public's understanding of the regulation of these chemicals, as well as the extent to which USDA has been enforcing legal provisions meant to reduce the risks that seeds treated with neonicotinoids pose to human health and the environment. Disclosure is therefore "likely to contribute 'significantly' to public understanding of government operations or activities." 7 C.F.R. pt. 1, subpt. A, app. A § 6(a)(1)(iv).

#### **B. NRDC Satisfies the Second Fee Waiver Requirement**

Disclosure in this case would also satisfy the second prerequisite of a fee waiver request because NRDC does not have any commercial interest that would be furthered by the requested disclosure. 5 U.S.C. § 552(a)(4)(A)(iii); 7 C.F.R. pt. 1, subpt. A, app. A § 6(a)(v)-(vi). NRDC is a not-for-profit organization and does not act as a middleman to resell information obtained under FOIA. "Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters.'" *Rossotti*, 326 F.3d at 1312 (internal citation omitted); *see Natural Res. Def. Council v. United States Env'tl. Prot. Agency*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008).

NRDC wishes to serve the public by reviewing, analyzing, and disclosing newsworthy and presently non-public information about the labels attached to seeds treated with harmful neonicotinoids. As noted in Part II.A, government regulation of treated seeds, as well as agency enforcement of industry compliance with labeling regulations for seeds treated with neonicotinoids, constitute matters of considerable public interest and concern. Disclosure of the requested records will contribute significantly to public understanding of USDA regulation of treated seeds and enforcement of labeling requirements.

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<sup>6</sup> David Gibbons et al., The Task Force on Systemic Pesticides, *Worldwide Integrated Assessment of the Impacts of Systemic Pesticide on Biodiversity and Ecosystems: A Review of the Direct and Indirect Effects of Neonicotinoids and Fipronil on Vertebrate Wildlife*, 22 *Env'tl. Sci. & Pollution Res.* 103 (2015), available at <http://link.springer.com/article/10.1007/s11356-014-3180-5> (Ex. L).

### C. NRDC Is a Media Requester

Even if USDA denies a public interest waiver of all costs and fees, NRDC is a representative of the news media entitled to a reduction of fees under FOIA, 5 U.S.C. § 552(a)(4)(A)(ii), and USDA's FOIA regulations, 7 C.F.R. pt. 1, subpt. A, app. A § 5(c); *see also* 7 C.F.R. pt. 1, subpt. A, app. A § 5(c)(1) (defining "representative of the news media"). A representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii); *see also Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 6, 11-15 (D.D.C. 2003) (a "non-profit public interest organization" qualifies as a representative of the news media under FOIA where it publishes books and newsletters on issues of current interest to the public); Letter from Alexander C. Morris, FOIA Officer, United States Dep't of Energy, to Joshua Berman, NRDC (Feb. 10, 2011) (Att. 42) (granting NRDC media requester status).

NRDC is in part "organized and operated to publish or broadcast news to the public." 7 C.F.R. pt. 1, subpt. A, app. A § 5(c)(1). As described earlier in this request, NRDC publishes a bimonthly digital magazine, OnEarth, which has won numerous news media awards, including the Independent Press Award for Best Environmental Coverage and for General Excellence, a Gold Eddie Award for editorial excellence among magazines, and the Phillip D. Reed Memorial Award for Outstanding Writing on the Southern Environment. NRDC also publishes a regular newsletter for its more than one million members and online activists; issues other electronic newsletters, action alerts, public reports and analyses; and maintains free online libraries of these publications. *See* 7 C.F.R. pt. 1, subpt. A, app. A § 5(c)(3) ("Examples of news media entities include . . . publishers of periodicals which disseminate news."). NRDC maintains a significant additional communications presence on the internet through its staff blogging site, "Switchboard," which is updated daily and features more than 250 bloggers writing about current environmental issues, and through daily news messaging on "Twitter" and "Facebook." *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 3, 121 Stat. 2524 (2007) (codified at 5 U.S.C. § 552(a)(4)(A)(ii)) (clarifying that "as methods of news delivery evolve . . . such alternative media shall be considered to be news-media entities").

The aforementioned publications and media sources routinely include information about current events of interest to the readership and the public. To publish and transmit this news content, NRDC employs approximately forty staff members dedicated full-time to communications with the public, including accomplished journalists and editors. These staff members rely on information acquired under FOIA and through other means. Public interest organizations meeting the

requirements “are regularly granted news representative status.” *Serv. Women’s Action Network v. Dep’t of Def.*, 888 F. Supp. 2d 282, 287-88 (D. Conn. 2012) (according media requester status to the American Civil Liberties Union).<sup>7</sup>

Information obtained as a result of this request will, if appropriately newsworthy, be synthesized with information from other sources and used by NRDC to create and disseminate unique articles, reports, analyses, blogs, tweets, emails, and/or other distinct informational works through one or more of NRDC’s publications or other suitable media channels. NRDC staff gather information from a variety of sources—including documents provided pursuant to FOIA requests—to write original articles and reports that are featured in its OnEarth magazine, newsletters, blogs, and other NRDC-operated media outlets. *See Cause of Action v. Fed. Trade Comm’n*, 961 F. Supp. 2d 142, 163 (D.D.C. 2013) (explaining that an organization can qualify for media-requester status if it “distributes work to an audience and is especially organized around doing so”). NRDC seeks the requested records to aid its own news-disseminating activities by obtaining, analyzing, and distributing information likely to contribute significantly to public understanding, not to resell the information to other media organizations.

### **III. Willingness to Pay Fees Under Protest**

Please provide the records requested above regardless of your fee waiver decision. In order to expedite a response, NRDC will, if necessary and under protest, pay fees in accordance with USDA’s FOIA regulations for all or a portion of the requested records. *See* 7 C.F.R. pt. 1, subpt. A, app. A. Please contact me before doing anything that would cause the fee to exceed \$100. NRDC reserves its rights to seek administrative or judicial review of any fee waiver denial.

### **IV. Conclusion**

Please email or (if it is not possible to email) mail the requested records to me at the NRDC office address listed below. Please send them on a rolling basis; USDA’s search for—or deliberations concerning—certain records should not delay the production of others that USDA has already retrieved and elected to produce. *See generally* 7 C.F.R. § 1.7 (describing response deadlines).

Please do not hesitate to call or email with questions.

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<sup>7</sup> To be a representative of the news media, an organization need not exclusively perform news gathering functions. If that were required, major news and entertainment entities like the National Broadcasting Company (NBC) would not qualify as representatives of the news media. This country has a long history, dating back to its founding, of news organizations engaging in public advocacy.

Thank you for your assistance with this matter.

Sincerely,

/s/ Margaret T. Hsieh

Margaret T. Hsieh

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